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No. 93-696

In The

Supreme Court of the United States

October Term, 1993

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

OHIO STATE UNIVERSITY D/B/A OHIO STATE UNIVERSITY HOSPITALS,

Respondent.

On Petition For A Writ Of Certiorari To the Sixth Circuit Court of Appeals

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner has presented the following question:

> Under Medicare regulations, the cost of training programs for interns and residents (known as graduate medical education, or GME, programs) is an "allowable cost" for which a hospital may receive reimbursement. 42 C.F.R. 413.85(a). Reimbursement is not available, however, for any "increased costs resulting from redistribution of costs from educational institutions or units to patient care institutions or units." 42 C.F.R. 413.85(c).

The issue presented is:

> Whether the Secretary reasonably determined that 42 C.F.R. 413.85(c) bars a hospital providing Medicare services from obtaining reimbursement of otherwise reimbursable GME program costs that previously were absorbed by its affiliated medical school.

As is discussed in this brief in opposition, neither an affirmative nor a negative response to the question presented by Petitioner would alter the outcome of this case. Rather, in order for this case to be affected by Petitioner's issue in *Thomas Jefferson University d/b/a Thomas Jefferson University Hospital v. Shalala*, petition for certiorari pending No. 93-120, it would be necessary for this Court to reverse the factual determinations of the lower court.

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JURISDICTION

Respondent does not take issue with the Petitioner invoking the jurisdiction of this Court under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Respondent does not take issue with Petitioner's historical review of the Medicare program except to disagree with Petitioner's statement that Congress' decision to

make fiscal year October 1, 1983 through September 30, 1984 the base year for subsequent reimbursement of graduate medical education ("GME") costs was part of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 101(a)(1), 96 Stat. 331. This is incorrect. Rather, this decision was part of the Consolidated Omnibus Reconciliation Act of 1985 passed by Congress in April of 1986, Pub. L. No. 99-272, § 9202.

Respondent does take issue with Petitioner's review of the facts. Petitioner has represented that the facts of this case are the same as those before this Court in the case of *Thomas Jefferson University d/b/a Thomas Jefferson University Hospital v. Shalala*, petition for certiorari pending, No. 93-120. This is incorrect. In the present case both the Provider Reimbursement Review Board ("PRRB") and the District Court for the Southern District of Ohio found that there had been no prior community support for the GME costs at issue in this case. Rather, Respondent had always been responsible for these costs. The Sixth Circuit Court of Appeals affirmed.

The evidence presented in this case established that Respondent had historically transferred substantial funds to the college of medicine in general suppport of its services to the GME program (seven million dollars in fiscal year 1985) and that from fiscal year 1983 through fiscal year 1988, Respondent incurred losses of approximately fifteen million dollars in operating its GME program. No evidence was presented which would support a finding that the community had undertaken to bear the overhead expenses of Respondent's GME program. *Ohio*

State University v. Sullivan, 777 F. Supp. 582, 585 (S.D. Ohio 1991), at Petitioner's App. 12a.[1]

Based upon these undisputed facts, the district court held that the Secretary had not relied upon the community support principle "because the evidence in this case would not support a finding that the community had undertaken to bear the overhead expenses of the Provider's GME program." *Id.* Rather, the court found that the Secretary had relied solely upon the redistribution principle. Therefore, the court's role was to determine whether the overhead costs **which had been borne by Respondent in the past** qualified as allowable costs. *Id.* at 588; Petitioner's App. 19a-20a. The court held that they did and therefore reversed the Secretary's decision to the contrary. The Secretary has specifically not raised the issue of allowable costs in this petition. *See*, Brief for Petitioner on Petition for Writ of Certiorari at p. 6, n. 5.

REASONS FOR DENYING THE PETITION

Respondent Ohio State University d/b/a Ohio State University Hospitals respectfully requests that this Court deny the petition for writ of certiorari seeking review of

[1] At footnote 7 of its petition, Petitioner states that "most GME-related costs . . . were absorbed directly by the medical school." There is absolutely no authority for this statement other than reliance upon a phrase from Respondent's post-hearing brief in which the related entities' principle was being argued. The Petitioner's statement also stands in direct contradiction to the district court's decision.

the decision of the United States Court of Appeals for the Sixth Circuit in this case.

Alternatively, in the event this Court determines that it will exercise its jurisdiction, Respondent urges this Court to deny Petitioner's request that this case be stayed pending this Court's decision in *Thomas Jefferson University d/b/a Thomas Jefferson University Hospital v. Shalala*, petition for certiorari pending, No. 93-120. Rather, the cases should be consolidated in order that Respondent has the opportunity to address the arguments which have been presented and to distinguish the facts of its case prior to this Court rendering its decisions.

The Facts of This Case Are Distinguishable From the Facts in the Case of Thomas Jefferson

The sole reason asserted by Petitioner as a basis upon which this Court should exercise its jurisdiction is that the question presented in both cases is the same:

> The question presented in both cases is whether the Secretary of Health and Human Services reasonably interpreted the regulation as barring reimbursement to a hospital of GME-related costs that in previous years had been absorbed by the hospital's affiliated medical school, but are now being claimed by the hospital for reimbursement under Medicare.

Petitioner's Petition at p. 7. If such costs have been absorbed by the affiliated medical school, the Secretary has taken the position that this constitutes past community support and, therefore, the claimed costs are not reimbursable. If there has been no community support,

however, then the Secretary has recognized that such costs are reimbursable.

In the present case, the district court, whose decision was affirmed by the appellate court, specifically held that the GME costs had NOT been previously absorbed by the medical school. Rather, the costs had been borne by Respondent. Accordingly, the key issue in *Thomas Jefferson* – community support – is not at issue here. It would therefore be necessary for this Court to reverse the factual determinations of the lower court in order for this case to present the same issue as that before this Court in *Thomas Jefferson*.

As was stated by the district court:

> In reversing the PRRB and finally denying reimbursement, the Administrator relied only on the principle of redistribution. In this respect, the Administrator's decision differs from his decisions in *Thomas Jefferson University Hospital v. Aetna Life Insurance Co.*, CCH Medicare & Medicaid Guide, § 38,353 (Jan. 18, 1990) and *University of Minnesota Hospitals v. Blue Cross & Blue Shield Assoc.*, CCH Medicare and Medicaid Guide § 39,420 (May 29, 1991), in which he invoked the community support principle of the rule and found that reimbursement of G & A costs should be disallowed because they had historically been borne by the community. This also distinguishes the present case from *Board of Trustees of State Institutions of Higher Learning v. Sullivan*, 763 F. Supp. 178 (S.D. Miss. 1991).

Ohio State University, 777 F. Supp. at 584-85, at Petitioner's App. 11a-12a.

This factual difference is also reflected in the district court's opinion in *Thomas Jefferson*, CCH Medicare & Medicaid Guide, Para. 40,294 at p. 30,963:

> In concluding that the Hospital was not entitled to the level of reimbursement claimed in connection with its GME program, the Administrator determined that the Hospital had run afoul of both the community support and the redistribution criteria. . . .

The court then reviewed the Secretary's decision which had found that community support included "tuition, hospital fees, grants, bequests, and state funded support from Pennsylvania and Delaware." *Id.* at 30,965.[2]

In *University of Minnesota v. Shalala*, CCH Medicare & Medicaid Guide, Para. 41,726 at p. 37,531, the District Court for the District of Minnesota also recognized that the facts before it and before the court in *Thomas Jefferson* were different than those at issue in this case:

> Unlike in *Ohio State University v. Sullivan*, 777 F. Supp. 582, 588 (S.D. Ohio 1991), where the provider incurred an operating loss for the years in question, here there is no evidence that the provider operated at a loss or that the costs at issue were not in fact absorbed by the Medical School from its various funding sources. The Secretary's decision that the costs at issue were borne

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[2] Reference to the Secretary's determination of what constitutes community support should not be construed as agreement with the Secretary's position. Respondent does not take issue with the position simply because it is irrelevant to the specific facts of Respondent's case.

> by the community was based on the substantial evidence.

Id. at 37,536.

Accordingly, there is no "square circuit conflict" as claimed by Petitioner in that the decision in this case does not stand for the proposition that a provider may claim reimbursement regardless of whether the costs had previously been claimed or paid by the provider as is alleged by the Petitioner. Rather, the decision in this case permitted recovery of allowable costs which had been previously incurred by the provider.

Petitioner's Request That This Case be "held" is Inappropriate and Would Be Unfair to Respondent

It is only by disregarding or disagreeing with the factual determinations of the lower court that an issue is presented consistent with that before this Court in *Thomas Jefferson*. Accordingly, the question presented by Petitioner does not present a basis upon which this Court should exercise its jurisdiction. However, should the Court exercise its jurisdiction, Respondent would be severely prejudiced if its case were "held" in abeyance pending this Court's decision in *Thomas Jefferson*. The reasons for this are twofold.

First, as has been previously stated, this case is factually different. Petitioner's argument in *Thomas Jefferson* as well as in the present case is that the Secretary recognizes a distinction between cases in which the community has

undertaken to absorb the costs of medical training programs and cases in which the community has not undertaken such responsibility. *See,* Brief for Respondent on Petition for Writ of Certiorari in *Thomas Jefferson,* at pp. 7-8. In the present case, the lower court determined that the only evidence presented established that the community had **not** absorbed the costs of Respondent's program. Rather, the costs had been borne by Respondent. Accordingly, this Court would be better informed if it was fully briefed as to both sets of facts prior to rendering a decision which will affect both cases.

Second, although this case is factually different, Respondent has several legal arguments which it would present in opposition to the arguments being advanced by Petitioner. If this Court exercises its jurisdiction but then holds this case in abeyance, Respondent will have been denied the opportunity to present its arguments to the Court prior to this Court rendering a decision which will substantially affect Respondent's rights. This would occur despite the fact that the case had been pending before the Court at the same time as the *Thomas Jefferson* case.

CONCLUSION

Petitioner has asked this Court to exercise its jurisdiction because Petitioner disagrees with a factual determination of the lower court. The role of this Court is to resolve legal issues of great public import, not to reverse findings of fact in order to be able to reach legal issues. Respondent therefore respectfully requests that this

Court deny the petition for writ of certiorari. Alternatively, Respondent respectfully requests, in the event the petition is granted, that this case be consolidated with *Thomas Jefferson University d/b/a Thomas Jefferson University Hospital v. Shalala*, petition for certiorari pending, No. 93-120, or that Respondent otherwise be granted the opportunity to fully brief and argue its case prior to a Court decision in the *Thomas Jefferson* case.

Respectfully submitted,

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